No. 17-71

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether decisions of the U.S. Fish and Wildlife Service "not to exclude" areas from critical habitat under Section 4(b)(2) of the Endangered Species Act are immune from judicial review.

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Mach Mining, LLC v. E.E.O.C., 135 S.Ct. 1645 (2015) ..... *passim*

Marbury v. Madison, 5 U.S. 137 (1803) 29, 30

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Michigan v. EPA, 135 S.Ct. 2699 (2015) 22, 24

Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983) 23

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Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 7, 23

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A Declaration of Rights and Fundamental Rules of the Delaware State § 12 (1776) 29

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Mass. Const., Art. XI (1780) 29

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Md. Const., Art. XVII (1776) 29

Tenn. Const., Art. XI, § 17 (1796) 29

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50 U.S.C.
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Amee B. Bergin, Comment, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?*, 28 B.C. Envtl. Aff. L. Rev. 363 (2001) 13

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Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envt'l. L. Rep. News & Analysis 10,678 (2013) 11

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 19

Committee on Environment & Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980 (Congressional Research Service eds., 1982) 24, 25, 27

Frederick Douglass, *Selected Speeches and Writings* (Lawrence Hill Books, 1999) 30

Matthew Groban, Case Note, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" to Protect?*, 22 Vill. Envt'l. L.J. 259 (2011) 11

Norman J. Singer, 2A *Sutherland Statutory Construction* (7th ed. 2007) 17

Pub. L. No. 95-632, 92 Stat. 3,751 (Nov. 10, 1978) 23, 24

Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332 (2008) 14

Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965 (1969) 31

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Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689 (1990) 13

Speech of Hon. John A. Bingham of Ohio, In the House of Representatives, February 28, 1866, In support of the proposed amendment to enforce the Bill of Rights (available at: https://archive.org/details/onecountryonecon00bing) 31

Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego L. Rev. 1633 (2004) 32

The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., Penguin Books 1961) 31

1 ANNALS OF CONG. (Joseph Gales ed., 1790) 31

3 W. Blackstone, Commentaries (1783) 28, 29

INTEREST OF *AMICUS CURIAE*[1]

National Federation of Independent Business Small Business Legal Center

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Small Business Legal Center (the "Legal Center"), frequently files *amicus* briefs in cases that will impact small businesses. The Legal Center files this *amicus* brief to provide a voice in these proceedings for

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[1] *Amici* National Federation of Independent Business and Building Industry Association of the Bay Area file this brief with the consent of all parties, which have filed their blanket letters of consent with the Clerk. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, counsel for *Amici* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no other person or entity other than *Amici*, their members, and their counsel contributed monetarily to the preparation or submission of this brief.

the rights of small business landowners. Their land is often one of their most valuable assets both in terms of financial investment and for their practical operations. It is highly problematic for ranchers, farmers, and other small business landowners when they are denied their common law right to put their lands to productive uses and profoundly concerning if they are denied the right to seek meaningful and timely judicial review of government-imposed restrictions under the Endangered Species Act ("ESA"). For similar reasons, the Legal Center participated as *amicus curiae* in *Sackett v. EPA*, 132 S.Ct. 1367 (2012), and *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016).

Building Industry Association of the Bay Area

Building Industry Association of the Bay Area ("BIABA"), a nonprofit association of builders, contractors, and related trades and professions involved in the residential construction industry, represents the interests of its members and the residential construction industry in Northern California. A part of BIABA's mission is to ensure that there is sufficient geographic territory available to its members on which they may conduct their residential construction activities. BIABA's members have been adversely impacted by overly broad ESA critical habitat designations. Several lower federal courts have determined that some such designations are not judicially reviewable under the Administrative Procedure Act ("APA").

BIABA was the lead plaintiff in *Building Industry Association of the Bay Area, et al. v. United States Department of Commerce, et al.*, 792 F.3d 1027 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 328 (2016), in which the Ninth Circuit held that the National Marine Fisheries Administration was immune from judicial review for its decision not to exclude vast areas of the California, Oregon, and Washington coasts from critical habitat designation for the Northern Distinct Population Segment of the Green Sturgeon. The Ninth Circuit's opinion imposed substantial negative economic impacts on BIABA's members, which will continue to be harmed to the extent that courts make rulings immunizing any aspect of critical habitat designation under the ESA from judicial review. BIABA has also engaged in substantial other federal litigation involving the implementation of the ESA by the U.S. Fish and Wildlife Service, including listing and delisting decisions and critical habitat designation.

The Court is considering two issues in this case: (1) Whether the ESA prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation, and (2) Whether an agency decision not to exclude an area from critical habitat because of economic impact of designation is subject to judicial review. *Amici* are particularly interested in the reviewability issue, which goes to the heart of the ability of landowners to seek relief from government overreach. Accordingly, this brief addresses solely the issue of whether decisions

not to exclude areas from critical habitat are immune from judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit held that decisions of the U.S. Fish and Wildlife Service (the "Service") to exclude areas from critical habitat under ESA Section 4(b)(2) are subject to judicial review while decisions not to exclude areas from critical habitat are immune from judicial review. The holding is illogical, inconsistent with the text of Section 4(b)(2), contradictory to the ESA's purposes and structure, and at odds with the ESA's legislative history. Furthermore, the lower court's holding clashes with the strong presumption in favor of reviewability firmly established in the APA and prescribed by legal tradition.

Crucially, the four-step process required by the ESA to designate critical habitat demonstrates that the Service's designations are subject to judicial review regardless of outcome. First, if the Service determines that a species requires ESA protection, it lists the species as either "endangered" or "threatened," depending upon the degree to which the species is at risk.

Second, for each protected species, the Service develops a candidate list of geographic areas to be considered for critical habitat designation and studies the conservation benefits to the species that would result from designating each area.

Third, the Service considers the economic impact of designating each area as critical habitat.

Fourth, the Service makes a final decision to designate or not to designate each particular area under consideration based upon a balancing of the conservation benefits to the species against the economic impacts of designation. Thus, the Service's sole task in the fourth step is to determine what areas to leave out of critical habitat and what areas to leave in. By deciding what to leave out, the Service necessarily decides what to leave in, and vice versa. This fourth step, which is the focus of the reviewability issue before the Court, is set forth in the second sentence of ESA Section 4(b)(2).

Judicial review of a decision made under Section 4(b)(2) is governed by the APA, under which there is a strong presumption of reviewability, which can be rebutted only by a showing that the Service's action has been either: (1) explicitly made immune from judicial review by Congress, or (2) implicitly committed to agency discretion by law because there is no law for courts to apply. It is undisputed that Section 4(b)(2) does not explicitly immunize critical habitat decisions from judicial review. The dispute is whether any particular types of critical habitat decisions are implicitly immunized from judicial review.

The lower court held that, while decisions to exclude areas from critical habitat are subject to judicial review because there is law to apply (*i.e.*, for abuse of discretion), decisions not to exclude are immune from

judicial review because there is no law to apply. But if there is law to apply with regard to decisions to exclude, that same law applies to decisions not to exclude. Either all critical habitat decisions under Section 4(b)(2) are subject to judicial review, regardless of result, or none of them are. It is the process itself that is reviewable for abuse, as explained by this Court in *Bennett v. Spear*, where the Service was required to redo a critical habitat designation because it failed to address economic impacts as mandated by Section 4(b)(2): "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." 520 U.S. 154, 172 (1997).

Further, as the *Bennett* Court observed, one of the ESA's goals "(if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. Accordingly, given the centrality of economic considerations in the critical habitat designation process, Congress could not have intended to provide for judicial review when the Service decides to exclude areas from critical habitat based on economic impacts while at the same time blocking judicial review when the Service decides not to exclude areas based on the same economic impacts. Such a one-way, outcome-determinative reviewability standard has never been sanctioned by this Court.

The lower court's ruling also is contrary to Congressional intent as reflected in the ESA's legislative history. Section 4(b)(2) was enacted as an amendment

to the ESA in 1978 in part as a response to this Court's statement in *Tennessee Valley Authority v. Hill* that, under a previous version of the ESA, species must be protected "whatever the cost." The amendment specifically required the Service to consider costs in designating critical habitat. It is unlikely that Congress would have amended the ESA in such a manner if it had intended to hinge reviewability on the outcome of the decisionmaking process, thereby reverting to the pre-1978 standard whenever the Service happened to decide, "whatever the cost," not to exclude an area from critical habitat. Under such circumstances, the economic impacts study mandated by the 1978 amendment as the third step of the critical habitat designation process would be relegated to a useless paper exercise.

Moreover, the lower court's decision is contrary to the strong presumption that executive actions are subject to judicial review, a principle enshrined since the early history of this Court in *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 316 (1795), which held that unchecked and unreviewable executive action would be a threat to the foundations of "Republican Government." Ever since *VanHorne's Lessee*, this Court has held to the presumption that, subject to certain limited exceptions not present here, executive actions are judicially reviewable, especially where, as here, private property rights are impacted.

Accordingly, the lower court's ruling that the Service's decisions not to exclude areas from critical habitat are immune from judicial review defies logic, is

inconsistent with the ESA's statutory text and structure, overlooks the relevant legislative history, and goes against the long-standing presumption of reviewability.

ARGUMENT

I

THE ESA'S TEXT REQUIRES, AND LOGIC DICTATES, THAT DECISIONS "NOT TO EXCLUDE" AREAS FROM CRITICAL HABITAT BE SUBJECT TO JUDICIAL REVIEW

Claims challenging actions taken by the Service under ESA Section 4(b)(2) are governed by the APA. *See Bennett*, 520 U.S. at 171-75 (holding that a claim challenging the Service's "maladministration of the ESA" is not reviewable under the citizen suit provisions of the ESA, but is reviewable under the APA). There is a strong presumption under the APA that agency actions are subject to judicial review. *See Mach Mining, LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1651 (2015), *Sackett v. EPA*, 132 S.Ct. 1367, 1373 (2012).

The APA provides that agency action may be immune from judicial review only in rare cases where Congress expressly precludes review or where the action is implicitly "committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to

judicial review.") (citation omitted) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (Judicial review "is available absent some clear and convincing evidence of legislative intention to preclude review."). Express preclusion must be made by Congress in "unmistakable terms." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). Absent express preclusion, judicial review is available except "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotation marks omitted). Judicial review is precluded implicitly when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Thus, preclusion of judicial review is not to be lightly inferred; rather, it must be demonstrated that Congress obviously intended an agency action to be unreviewable. *See Sierra Club v. Peterson*, 705 F.2d 1475, 1479 (9th Cir. 1983).

ESA Section 4(b)(2) is comprised of two sentences. On its face, the text does not explicitly immunize from judicial review decisions "not to exclude" areas from critical habitat:

> The secretary shall designate critical habitat . . . after taking into consideration the economic impact . . . of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he

> determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

The lower court held that the permissive language used in the second sentence (*i.e.*, the term "may") implicitly places decisions "not to exclude" outside the reach of judicial review. This Court disagrees. *Bennett*, 520 U.S. at 172 (reasoning that the use of the term "may exclude" in Section 4(b)(2) does not undercut "the fact that the Secretary's ultimate decision is reviewable [under the abuse of discretion standard])."

Moreover, in addressing reviewability under the APA more broadly, this Court made the following distinction in *Heckler*:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect [but] when an agency *does* act . . . that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to

> determine whether the agency exceeded its statutory powers.

470 U.S. at 832 (emphases in original). Here, the Service *acted* when it designated critical habitat because it "exercise[d] its coercive power" over private property by imposing substantial restrictions on the use, enjoyment, and development of such property. *See* Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envt'l. L. Rep. News & Analysis 10,678, 10,680 (2013) ("Considerable regulatory burdens and corresponding economic costs are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation."); *see also* Matthew Groban, Case Note, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" to Protect?*, 22 Vill. Envt'l. L.J. 259, 279 (2011) (Critical habitat designations "have the ability to ruin individuals' lives.").

Accordingly, under *Heckler*, action to exclude or not to exclude areas from critical habitat "can be reviewed to determine whether the agency exceeded its statutory powers," 470 U.S. at 832, and under *Bennett*, such actions are reviewable for abuse of discretion. 520 U.S. at 172. Thus, the artificial distinction made by the lower court between exclusion decisions and decisions "not to exclude" finds no support in *Heckler* or *Bennett*.

The lower court's citations to decisions of the Ninth Circuit in support of its unreviewability holding

are to no avail. The citations to *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989-90 (9th Cir. 2015), and *Bldg. Industry Association of the Bay Area, et al. v. U.S. Dep't of Commerce, et al.*, No. 13-15132, 2015 WL 408-761 at 8 (9th Cir. July 7, 2015), for the proposition that the statute's permissive term "may" requires a finding of unreviewability of "not to exclude" decisions, is contrary to *Bennett's* teaching that the abuse of discretion standard applies to the Service's decisions. *See* 520 U.S. at 172. And it is antithetical to *Heckler's* teaching that there is law to apply where agencies exercise coercive power over property rights. *See* 470 U.S. at 832. The lower court's decision is also contrary to the well-established principle that permissive language used in a statute does not imply unreviewability. *See Barlow*, 397 U.S. at 166 (statute authorizing Secretary of Agriculture to promulgate regulations "as he may deem proper" does not preclude judicial review). For the same reasons, the lower court's citations to a handful of district court decisions at odds with the foregoing precedents of this Court are unavailing. *See* Slip Opinion at 29-30.

Two recent decisions of the D.C. Circuit rejected agencies' assertions of a lack of manageable judicial standards where, as here, they had acted pursuant to a discretionary provision using the permissive term "may." In *Amador Cty. v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), a section of the Indian Gaming Regulatory Act stated that the Secretary of Commerce "may disapprove" a compact for only three particular reasons. The court held that the use of this permissive language

followed by the articulation of reasons for the exercise of that discretion indicated that the "use of 'may' is best read to limit the circumstances in which disapproval is allowed." *Id.* at 381. In *Dickson v. Sec'y of Def.*, 68 F.3d 1396 (D.C. Cir. 1995), the court examined a provision granting discretion to the relevant agency: it "may excuse a failure to file [for a correction of military record] within three years after discovery if it finds it to be in the interest of justice." *Id.* at 1399 (citation omitted). The court likewise rejected the assertion of a lack of manageable judicial standards, reasoning that the permissive term "may" did not indicate unfettered discretion as "this construction would mean that even if the Board expressly found in a particular case that it was 'in the interest of justice' to grant a waiver, it could still decline to do so." *Id.* at 1402 n.7. Accordingly, simply because the ESA Section 4(b)(2) uses permissive language does not mean that decisions "not to exclude" are unreviewable. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 695 (1990) (observing that "the APA contains compelling internal evidence" rejecting the view that the presence of agency discretion precludes judicial review).

Furthermore, an expansive application of the "no law to apply" concept raises profound constitutional and public policy questions. *See* Amee B. Bergin, Comment, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?*, 28 B.C. Envtl. Aff. L. Rev. 363 (2001) (suggesting that a wholly unreviewable grant of discretionary power would violate the nondelegation

doctrine); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332, 1339 (2008) ("In a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent.").

Moreover, the distinction made by the lower court between the reviewability of excluding an area and not excluding an area from critical habitat under Section 4(b)(2) is illogical. The first sentence of Section 4(b)(2) requires economic impacts to be taken into account in designating critical habitat. The second sentence mandates the manner in which such economic impacts must be considered (*i.e.*, balancing of the conservation benefits of inclusion vs. the economic benefits of exclusion). The lower court concluded that agency abuse of the balancing-of-the-benefits requirement provides a sufficient standard for purposes of judicial review when the Service decides to exclude an area from critical habitat but not when it decides to include an area as part of critical habitat. According to the lower court, the standard is sufficient for judicial review when the government decides to leave an area out but not sufficient when it decides to leave an area in. It defies logic that the Service could determine what to exclude without at the same time determining what to include. To be out of bounds one must know what is in bounds.

If the abuse of discretion standard provides a meaningful standard to review a decision to exclude,

then a decision not to exclude can be reviewed applying the same standard. Once a candidate list of potential critical habitat areas is established, a decision as to what areas will be left out necessarily determines what areas will be left in. Either all inclusion or exclusion decisions, regardless of outcome, are reviewable, or none of them are. Because the lower court acknowledges that decisions to leave areas out are reviewable so too must be decisions to leave areas in.

II

THE OBJECTIVES AND STRUCTURE OF THE ESA REQUIRE THAT DECISIONS "NOT TO EXCLUDE" AREAS FROM CRITICAL HABITAT BE SUBJECT TO JUDICIAL REVIEW

One objective of the ESA is "to provide a program for the conservation of . . . endangered species and threatened species," 16 U.S.C. § 1531(b), while "another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77. Those dual objectives of species conservation and avoidance of unnecessary economic dislocation are reflected in the structure of the ESA.

The protection of species from extinction is governed by a four-step process. First, before a species receives ESA protection, it must be listed as "threatened" or "endangered." A "threatened" species is "any species which is likely to become an endangered species within

the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing decisions must be based purely on conservation criteria. Economic or other factors may not be considered in making a listing determination. *See* 16 U.S.C. § 1533(a)(1)(A)-(E).

Second, for threatened or endangered species, the Service has a duty under the ESA and applicable regulations to develop, "to the maximum extent prudent and determinable," a list of geographic areas that may serve as critical habitat for the species. 16 U.S.C. § 1533(a)(3)(A). In relevant part, critical habitat is defined as

> the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection.

16 U.S.C. § 1532(5)(A).

Third, under the first sentence of ESA Section 4(b)(2), before designating "any particular area" as critical habitat, the Service must consider the economic impact of such designation. 16 U.S.C. § 1533(b)(2).

Fourth, under the second sentence of ESA Section 4(b)(2), the Service "may exclude any area from critical habitat if [it] determines that the benefits of exclusion

outweigh the benefits of specifying such area as part of critical habitat." *Id.*

Accordingly, while economic factors may not be taken into account in determining whether or not to list a species as endangered or threatened, the economic impacts of critical habitat designation must be considered before any area is actually designated. *Id.*; *see also Bennett*, 520 U.S. at 172. Thus, listing decisions must exclusively further the statutory objective of species' conservation, while critical habitat designations must take into account both the conservation objective and the objective of avoiding "needless economic dislocation." *Bennett*, 520 U.S. at 176-77. It is untenable that one of the "primary" objectives of the ESA (the avoidance of needless economic dislocation) would be left by Congress entirely to the discretion of the government. Yet immunizing from judicial review any decision by the Service "not to exclude" an area from critical habitat regardless of economic impacts leaves a "primary" objective of avoiding economic dislocation to the unfettered discretion of the Service and leaves impacted landowners without a remedy. "In expounding a statute, we must not be guided by a single sentence, . . . but look to the provisions of the whole law, and to its object and policy." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)); *see also* Norman J. Singer, 2A *Sutherland Statutory Construction* § 45:8 (7th ed. 2007) ("Explanation of the purpose [of a statute] is a way of focusing attention on an

insight that is often helpful in making a judgment about intent or meaning.").

Thus, critical habitat designation under Section 4(b)(2) is the specific part of the ESA where Congress has required the government to focus on the economic objectives of the Act. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The text of Section 4(b)(2), coupled with the design and structure of the Act, forecloses the lower court's holding that exclusion decisions are reviewable while decisions not to exclude are not. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995); *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (Courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 861 (1984) ("[T]he meaning of a word must be ascertained in the context of achieving particular objectives."). Accordingly, Congress could not have intended the Service to exercise unfettered and unreviewable discretion as to how it will implement a primary objective of the ESA, namely, that of avoiding "needless economic dislocation,"

whenever it decides "not to exclude" an area from critical habitat designation. *Bennett*, 520 U.S. at 177.

Furthermore, the decision to exclude or not to exclude is governed by the same statutory criteria, *i.e.*, balancing the conservation benefits against the economic impacts. *See* 16 U.S.C. § 1533(b)(2) (whether "the benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat"). Accordingly, Congress could not have intended, and it would be nonsensical, for the availability of judicial review to depend upon the result of the indivisible process of determining what to leave in and what to leave out. "Statutory construction is a holistic endeavor and . . . the meaning of a provision is clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001) (internal quotation marks and citation omitted; brackets in original); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."); *Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum.").

In *Mach Mining*, this Court examined the requirement of Title VII of the Civil Rights Act of 1964 mandating that, before EEOC could sue an employer for violations of that statute, the agency must first

"endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The court of appeals had held that "the statutory directive to attempt conciliation is not subject to review" because "that provision entrusts conciliation solely to the EEOC's expert judgment and thus provides no workable standard of review for courts to apply." *Mach Mining, LLC*, 135 S.Ct. at 1650 (internal quotation marks and citations omitted). This Court first reiterated that there exists "a strong presumption favoring judicial review of administrative action," noting that if "a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct," the agency could meet its "heavy burden in attempting to show that Congress prohibit[ed] all judicial review of the agency's compliance with a legislative mandate." *Id.* (internal quotation marks and citations omitted; brackets in original).

EEOC argued that it had met that burden because Title VII provided "no standards by which to judge its performance of its duty to conciliate," that it had "broad leeway . . . to decide how to engage in, and when to give up on, conciliation," and thus Congress had provided no "judicially manageable criteria with which to review EEOC's efforts." *Mach Mining, LLC*, 135 S.Ct. at 1652 (citations and internal quotation marks omitted). While acknowledging that "the statute provides the EEOC with broad latitude over the conciliation process," the Court rejected the government's argument that "Congress has [] left everything to" the

agency's discretion, noting that if EEOC took an employer to court without making an attempt at conciliation, there would be "a perfectly serviceable standard for judicial review." Importantly, the Court noted that the conciliation provision contained "concrete standards" relevant to what such an "endeavor" must include. Because the provision made the goal of conciliation "eliminat[ing] [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion," the agency would necessarily be required to communicate among the parties, exchanging information and views about the particular claim. *Id.* If the EEOC did not take those actions, it would not satisfy Title VII and courts would have judicially manageable standards to so determine. *Id.*[2]

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[2] Compare *Webster v. Doe*, 486 U.S. 592 (1988), where this Court evaluated a provision of the National Security Act that granted the Director of the CIA the authority to terminate any employee when the Director "shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. § 403(c). Given that this empowered termination not only where it is satisfied under some external standard, but whenever the Director "deems" it satisfied, the provision "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review . . . and [was] thus 'committed to agency discretion by law'" and unreviewable by courts. *Webster*, 486 U.S. at 600 (quoting 5 U.S.C. § 701(a)(1)). The *Webster* Court bolstered this point by referencing the "overall structure of the [National Security Act]." Another provision of that statute gave the Director the duty of "protecting intelligence sources and methods from unauthorized disclosure," *id.* (quoting 50 U.S.C. § 403(d)(3)). The Court had previously stated that "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act, . . . indicates that Congress vested in the Director of Central Intelligence very broad authority

Just as in *Mach Mining*, the overall goals and procedures concretely articulated in surrounding language of the provision at issue serve to provide judicially manageable standards for the agency's decision to not exclude areas from critical habitat designation. Economic impacts must be considered in relation to any benefits from designation or exclusion. The criteria of balancing economic impacts against conservation benefits provides a cogent and judicially manageable standard upon which to review critical habitat designations for abuse of discretion, regardless of result. Any agency decision failing to satisfy that standard is unlawful and must be set aside.

Moreover, there is a substantial body of law available for courts to apply in reviewing the Service's decisions not to exclude areas from critical habitat under ESA Section 4(b)(2). "Agencies must rely on facts in the record and its decisions must rationally relate to those facts." *See Bowen v. Am. Hosp. Assoc.*, 476 U.S. 610, 626 (1986). "Federal administrative agencies are required to engage in reasoned decisionmaking. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, 135 S.Ct. 2699, 2706 (2015) (internal quotation

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to protect all sources of intelligence information from disclosure." *Id.* at 601 (quoting *CIA v. Sims*, 471 U.S. 159, 168-69 (1985)). Because the discretionary termination provision was "part and parcel of the entire Act," the "language and structure" of the provision "preclud[ed] judicial review of these decisions under the APA." *Id.* No such national security objectives, language, or structural elements are to be found in the ESA.

marks and citations omitted). Agency action is lawful only if it is based "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Agency action is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem" or has "offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* at 44. Accordingly, the lower court's ruling that there is "no law to apply" in connection with the Service's decision not to exclude an area from critical habitat is contradicted by a long line of cases decided by this Court requiring the opposite conclusion. At the very least the record must demonstrate that the agency gave reasoned consideration to economic impacts.

III

THE LEGISLATIVE HISTORY OF THE ESA SHOWS THAT CONGRESS INTENDED AGENCY DECISIONS "NOT TO EXCLUDE" AREAS FROM CRITICAL HABITAT BE SUBJECT TO JUDICIAL REVIEW

This Court held under an earlier version of the ESA that the statute was intended by Congress to conserve species "whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). Partly in response to that decision, Congress enacted amendments to the ESA in 1978, Pub. L. No. 95-632, 92 Stat. 3,751 (Nov. 10, 1978), expressly requiring a consideration of

economic impacts in connection with critical habitat designation.[3] *Id.* Sections 11, 92. Stat at 3,766. Those amendments gave the Service the authority to exclude areas from critical habitat based on a balancing of the conservation benefits of inclusion versus the economic benefits of exclusion. The lower court's decision undoes Congress's effort to include economic considerations in the critical habitat decisionmaking process. Absent judicial review of decisions "not to exclude" an area from critical habitat, property owners would have no relief from irrational agency designations that provide little if any conservation benefit while causing substantial economic damage. This Court has refused to accept such unreasonable agency action. *See Michigan*, 135 S.Ct. at 2707 (EPA operated outside "the bounds of reasonable behavior" when it interpreted a provision of

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[3] *See* Committee on Environment & Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980, at 822 (Congressional Research Service eds., 1982) (statement of Rep. Robert Leggett of California) ("We should be concerned about the conservation of endangered species, but I, for one, am not prepared to say that we should be concerned about them above all else."); *id.* at 919 (statement of Sen. Howard H. Baker, Jr., of Tennessee) ("I do not believe, however, that Congress intended that the protection or management of an endangered species should in all instances override other legitimate national goals or objectives with which they might conflict."); *id.* at 1068 (statement of Sen. William Scott of Virginia) ("People are more important than fish."); *id.* at 1006 (statement of Sen. Edwin Garn of Utah) ("Certainly, in 1973, there was a great environmental push. The Endangered Species Act passed the Senate extremely easily, with no dissenting votes. But, talking to many of my colleagues, I learn that they certainly would not have voted for it if they had known the implications and the extremes to which the act would be carried.").

the Clean Air Act to allow it to "ignore costs when deciding whether to regulate power plants."); *see also Bennett*, 520 U.S. at 172 (observing that "the Secretary's ultimate decision" regarding critical habitat designation "is reviewable . . . for abuse of discretion"). It is pointless to assess the economic impacts of a critical habitat designation if that assessment, as implemented through the exclusion process, is immune from judicial review. The lower court's decision impermissibly converts the Service's obligation to assess economic impacts of critical habitat designation into a meaningless paper exercise, a result that should not be countenanced by this Court. *See Bennett*, 520 U.S. at 172 (holding that the Service has a nondiscretionary duty to assess economic impacts prior to critical habitat designation).

Some details of the ESA's legislative history are particularly informative:

> [T]he 1978 amendments significantly altered the structure of the act by establishing a procedure to *balance* the interests in conserving endangered species against other legitimate national concerns.

A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980: Together with a Section-by-Section Index (Comm. Print) (1982) at 1348-49 (statement of Representative Bowen) (emphasis added). The balancing procedure envisioned by Congress is reflected in significant part in the balancing-of-the-benefits methodology required by Section 4(b)(2) for critical habitat designation.

In fact, the legislative history of the 1978 Amendments underscores the importance that Congress placed in ensuring full ventilation and analysis of economic impacts in connection with critical habitat designations:

> The 1978 amendments established *much more*, however, than just creating a safety valve in the act. The amendments also required a number of other important changes in the endangered species program which are designed to insure that the program is run in the manner that Congress intended. The act now requires the preparation of *economic impact statements* on proposed critical habitat designations. . . .

Id. at 1349 (emphasis added). Because the requirement to consider economic impacts is "much more . . . than just . . . a safety valve" and calls for the equivalent of "economic impact statements," Congress could not have intended that upon a review of economic impacts a decision not to exclude areas from critical habitat be left entirely to the discretion of the Service. "[Courts] must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. Accordingly, the lower court should have asked itself whether "alternative interpretations consistent with the legislative purpose are available." *See Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).

There could be no clearer statement of legislative intent than that of Representative Murphy:

> The Conference Report includes the House provision mandating the Secretary to consider the economic impact of designating critical habitat for any species. The Secretary is authorized to alter the critical habitat designation based on this economic evaluation. This is *the most significant provision in the entire bill.*

A Legislative History of the Endangered Species Act of 1973, *supra*, at 1221 (emphasis added) (statement of Representative Murphy). Government decisionmaking in connection with the consideration of economic impacts, characterized on the floor of the House of Representatives as the "most significant provision in the entire bill," could not have been intended to be left to the unconstrained discretion of "agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77.

IV

THE AVAILABILITY OF JUDICIAL REVIEW IS FUNDAMENTAL TO OUR SYSTEM OF GOVERNMENT AND THE RULE OF LAW

Early in its history, this Court heard a case addressing the issue of whether government encroachment of property rights is subject to judicial review. In *VanHorne's Lessee v. Dorrance*, 2 U.S. 304 (1795), the Court examined a state law that granted a state board authority to make decisions regarding the value of private property. The state argued that the decisions of

that agency were final and not appealable in court. This Court disagreed:

> The proprietor stands afar off, a solitary and unprotected member of the community, and is stript of his property, without his consent, . . . the value of that property judged upon without his participation, or the intervention of a Jury. . . . If this be the Legislation of a Republican Government, in which the preservation of property is made sacred by the Constitution, I ask, wherein it differs from the mandate of an Asiatic Prince?

Id. at 316. The same question could be asked here.

The Service's decision not to exclude the private property of the Petitioners devalues the property and burdens Petitioners' property rights. Indeed, the effect on Petitioners' property here is measured in millions of dollars. Pet. Br. at 32. But the lower court held that the Service's decision injuring these property rights is wholly immune from judicial review.

In enacting the APA, Congress recognized a "strong presumption" in favor of the reviewability of administrative actions, *Mach Mining, LLC*, 135 S.Ct. at 1653, but that presumption long predates the APA. The right to judicial review of executive actions has its origins in natural justice and common law.

Since before the time of Blackstone, it has been "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 W.

Blackstone, Commentaries 23 (1783). The revolutionary generation thought the principle so crucial that several States put it into their constitutions.[4] Justice Marshall explicitly imported this theory into American jurisprudence in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), noting that our Government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Several years later, the Court opined on the importance of reviewability for injuries to rights, noting that it would be a "monstrous heresy . . . [that there should be] . . . no remedy" for a government action that impacted a citizen's rights. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 567 (1838).

The presumption of review is particularly strong with regard to property rights. Indeed, this Court has frequently noted that judicial protection of private property is both the impetus and justification for government. *See, e.g.*, *Calder v. Bull*, 3 U.S. 386, 388 (1798). Judicial protection of property rights is a central element of the social compact:

> The right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.

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[4] *See, e.g.*, A Declaration of Rights and Fundamental Rules of the Delaware State § 12 (1776); 2 Sources and Documents of United States Constitutions 197, 198 (W. Swindler ed. 1775); Md. Const., Art. XVII (1776), 4 *id.*, at 372, 373; Mass. Const., Art. XI (1780), 5 *id.*, at 92, 94; Ky. Const., Art. XII, cl. 13 (1792), 4 *id.*, at 142, 150; Tenn. Const., Art. XI, § 17 (1796), 9 *id.*, at 141, 148.

> Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.

VanHorne's Lessee, 2 U.S. at 310.

Review is particularly important when the injury to property is caused by government. "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals." *United States v. Lee*, 106 U.S. 196, 219 (1882); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (same). In the absence of such tribunals, there remains to the citizen only "the alternative of resistance, which may amount to crime." *Id.*

To avoid this result, this Court has long construed any law "derogatory to the rights of property" narrowly, *VanHorne's Lessee*, 2 U.S. at 316,[5] and generally provides judicial review for government actions affecting property. *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing *Marbury*, 5 U.S. at 163). In the administrative law context, "the exception of 'discretion' from review shield[s] 'sound' discretion only; it in no wise exempt[s] the

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[5] *See also* Frederick Douglass, *Selected Speeches and Writings*, 386-87 (Lawrence Hill Books, 1999). "Where a law is susceptible of two meanings ... the language of the law must be construed strictly in favour of justice and liberty."

antithetical 'abuse of discretion' from the review expressly directed by [the Administrative Procedure Act]." Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 970 (1969). Thus, it has always been the case that government restriction of property rights is generally subject to judicial review.

When James Madison introduced the Bill of Rights in Congress, he noted the importance of judicial review as a fundamental check on the other branches. According to Madison, "independent tribunals of justice" are to be "an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights." 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1790). Alexander Hamilton went further, arguing that limited government "can be preserved in practice no other way than through the medium of courts of justice. . . . Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., Penguin Books 1961). Several decades later, John Bingham, who drafted the Fourteenth Amendment, echoed this sentiment from the floor of Congress, arguing that if individual rights were not enforceable by an action in federal court, the rights were "dead letter."[6]

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[6] Speech of Hon. John A. Bingham of Ohio, In the House of Representatives, February 28, 1866, In support of the proposed amendment to enforce the Bill of Rights (available at: https://archive.org/details/onecountryonecon00bing).

The lower court's opinion not only stands opposed to the text of ESA Section 4(b)(2), the dictates of logic, the objectives and structure of the ESA, and the legislative history, but also to the concepts of limited government, separation of powers, and protection of fundamental rights. *"[U]bi jus, ibi remedium* – for every right, [there is] a remedy." *Towns of Concord, Norwood & Wellesley, Mass. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992). This legal principle is an integral part of the due process guaranteed by the Constitution. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego L. Rev. 1633 (2004). The fundamental right to have an independent judicial evaluation of grievances against government action lies at the heart of our system of jurisprudence, and "[a]gencies may not use shell games to elude review." *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293 (D.C. Cir. 2000). Fundamental fairness requires giving a party aggrieved by government action the "opportunity to be heard." *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

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